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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1537

GLEN KING - - - - - - - *Petitioner*

v.

SHELBY RURAL ELECTRIC COOPERATIVE CORPORATION - - - - - - *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

May it please the Court:

STATEMENT OF THE CASE

Nature of the Proceedings

The petitioner herein, Glen King, filed an action for damages against the respondent, Shelby Rural Electric Cooperative Corporation, in the Shelby Circuit Court of the Commonwealth of Kentucky.

His claim was for damages arising out of the alleged tort liability of the respondent.

During the course of the proceedings a summary judgment was rendered in favor of the Shelby Rural Electric Cooperative Corporation; and, thereafter, the

petitioner perfected an appeal to the Court of Appeals of Kentucky.

In due course, and after oral arguments, the Court of Appeals of Kentucky decided the case adversely to the petitioner. A petition for rehearing was filed which was overruled. The mandate was issued forthwith.

The petitioner, Glen King, has now filed a petition for a writ of certiorari to the Court of Appeals of Kentucky alleging this Court has jurisdiction as set forth in 28 U.S.C. § 1257(3).

The case below was styled King v. Shelby Rural Electric Cooperative Corporation and is cited as 502 S. W. 2d 659.

Statement of Facts

The case can be succinctly stated by quoting from the decision of the Kentucky Court of Appeals as follows:

> "This is an appeal from a summary judgment dismissing appellant's claim. It involves the tort liability of Shelby Rural Electric Cooperative Corporation, hereinafter referred to as Shelby, to an employee of its independent contractor, Electricom, Inc.
>
> Shelby owns and operates an electric transmission system. In the operation of its business it became necessary for it to convert a single-phase transmission line to a three-phase line. As this was a major undertaking, Shelby employed Electricom, an independent contractor, rather than use its own employees to do the work.

Electricom was an experienced contractor in the construction of electric and telephone utility lines and Shelby had previously utilized its services. No suggestion is made that Shelby was negligent by reason of its selection of Electricom as the independent contractor to do the work.

Appellant, an employee of Electricom, was severely burned while working on an energized line.[1] He instituted this action seeking recovery against Shelby on three grounds:

1. Shelby was liable for the negligence of its independent contractor;
2. Shelby was liable because of its own negligence resulting in injury to appellant;
3. Shelby violated certain contractual duties owed to appellant.

Shelby admitted that Electricom was negligent because of its failure to observe certain safety precautions and because of its failure to furnish appellant adequate training and suitable safety equipment. Shelby contended the accident resulted from the sole negligence of Electricom or from the negligence of Electricom and the contributory negligence of the appellant.

There is no dispute as to the facts. The real question is whether Shelby is shielded from liability by reason of the employer-independent contractor relationship."

The case was duly submitted to the Kentucky Court of Appeals and the parties thereafter filed briefs.

"[1]Appellant and Electricom were covered by the provisions of the Workmen's Compensation Act and appellant was paid benefits thereunder."

Subsequently, and on motion of the petitioner, Glen King, the Kentucky Court of Appeals heard oral arguments. On November 9, 1973, an opinion was rendered affirming the lower court and dismissing the complaint of Glen King.

On or about the 7th day of December, 1973, the petitioner, Glen King, filed a petition for rehearing before the Kentucky Court of Appeals. In his petition for rehearing before the Kentucky Court, Glen King raised for the first time the question concerning the validity of the Kentucky Workmen's Compensation Act and its possible conflict with the Fourteenth Amendment to the United States Constitution.

ARGUMENT

We feel that the request for a writ of certiorari should be denied for two reasons. First, this Court does not have jurisdiction of this case under 28 U.S.C. § 1257(3) for the reasons that will be hereinafter stated, and, secondly the constitutional question was not timely raised in the court below.

Under 28 U.S.C. § 1257(3) the Supreme Court cannot review a final judgment or decree rendered by the highest court of the Commonwealth of Kentucky unless there was "drawn in question" before that court "the validity of a state statute," i.e., the Kentucky Workmen's Compensation Act, "on the ground of its being repugnant to the Constitution, . . . of the United States."

In order for the Supreme Court to review by certiorari the final judgment of the highest court of a

state it must appear that the state court had first been appraised that a state statute was being attacked as invalid on federal grounds. It must also appear that the state court had the opportunity to authoritatively construe the conflict and rule upon the validity of the state statute under the laws and/or Constitution of the United States. See Wilson v. Cook, 327 U. S. 474, 66 S. Ct. 663.

It must also appear that the decision below turned upon a Constitutional question and that a decision on that question was necessary to the determination of the case. If the judgment of the state court rests upon adequate and independent grounds of state law certiorari should not be granted.

The Supreme Court of the United States reviews judgments, not statements and opinions. It was stated in the case of Black v. Cutter Laboratories, 351 U. S. 292, 76 S. Ct. 824, that the Supreme Court ". . . should not pass on federal questions discussed in the opinion" of a state court "where it appears that the judgment rests on adequate state grounds."

Perhaps the best statement in this area is found in the case of Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459, and we quote as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . citing cases . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of

> our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

These prerequisites do not appear from the petition for the writ of certiorari nor do they appear from the final opinion of the Kentucky Court. The decision, as rendered, did not discuss nor attempt to determine a constitutional question but was simply a decision rendered under the existing Kentucky common law.

The Kentucky Court of Appeals in rendering its decision determined that an employer is not liable for physical harm caused to another by the act or omission of an independent contractor and it also held that it was aligning itself with its sister jurisdictions holding that an employer's responsibility for the negligence of his independent contractor engaged in the performance of work known to be inherently dangerous does not extend to the employees of the independent contractor. The court gave two reasons for its findings which are more fully set forth in the opinion. This is a correct and proper function of an appellate court of a state in order to determine the public policy of that jurisdiction.

The decision does not involve in any way the determination of whether the Fourteenth Amendment to the United States Constitution secures to an injured

employee of an independent contractor the right to recover damages from the contractor's employer, in spite of the fact that such employee is covered by workmen's compensation insurance carried by the contractor as stated in the petition for writ of certiorari.

The petitioner, appellant below, also recognized that this was the basis of his case; and, again, we quote from the opinion of the Kentucky Court of Appeals as follows:

> "This case was practiced as an independent contractor case and in at least five instances the main subdivisions in appellant's brief relate to the duties of an employer to the employees of an independent contractor."

The opinion of the court below is not interpreting a statute which excludes an employee of an independent contractor from recovering from a contractee. It is the interpretation and molding of the old common law principle to which the opinion addresses itself. Prosser on Torts, 3rd Ed., p. 480. This function of the court is well recognized as a necessary one to keep the law current. City of Louisville v. Chapman, Ky., 413 S. W. 2d 74.

There are many relationships, such as the one in question, which for various court-ordained policy reasons, prohibit recovery by a peron who is injured. The most obvious is contributory negligence, but the doctrines of fellow servant, governmental immunity, joint venture, inter-family immunity, and trespasser/landowner are also examples of relationships which prohibit or limit recovery for a personal injury. If the peti-

tioner is correct in this instance then all of these doctrines are violative of the Kentucky and the United States Constitutions.

The opinion of the Kentucky Court of Appeals cites the Workmen's Compensation Statutes as indications and explanations of what the public policy is in Kentucky concerning employees of skilled independent contractors, and those statutes are used to define the common law in this area. Those policy determinations are set forth in the opinion and they are valid and necessary to promote specialists in the industry. The Kentucky Workmen's Compensation Act and its constitutionality was not involved in the correct determination of this case by the Kentucky Court of Appeals.

Secondly, the Supreme Court Rules provide that where the review of the judgment of a state court is sought by a petition for a certiorari the party seeking the writ must specify the stage at which and the manner in which the federal or constitutional questions sought to be reviewed were raised in the court below. We quote Rule 23(f) of the Supreme Court Rules as follows:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by

> the court; . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This is a jurisdictional requirement.

Petitioner seeks to set aside this jurisdictional requirement by stating that in his ". . . Petition for Researing[1] before the Court of Appeals of Kentucky, King argued that the conclusion expressed in that Court's decision conflicts with not only Section 14 and 54 of the Kentucky Constitution but also with the Fourteenth Amendment to the Federal Constitution."[2]

The decision in the case was rendered on November 9, 1973. The petition for rehearing was filed on December 7, 1973, and by the petitioner's own admission the Fourteenth Amendment to the United States Constitution was mentioned for the first time.

The petition for rehearing was denied and the mandate of the Kentucky Court of Appeals affirming the order of the trial court dismissing the complaint of Glen King was issued without additional findings or comment on January 18, 1974. See Appendix B of the petition for a writ of certiorari.

We submit that such a question should have been raised before the decision was rendered by the Kentucky Court of Appeals. The raising of such a question on a petition for rehearing before that court is too late.

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[1]Should be "Rehearing."

[2]See Page 9 of petition for writ of certiorari filed herein by Glen King.

In the case of Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, this Court held that where the grounds for jurisdiction of the Supreme Court of the United States is alleged to be the denial of a privilege secured by the Constitution of the United States and that if such denial was set up for the first time in a petition for rehearing before the court of last resort in the state wherein the action arose it is too late. To the same effect, see Citizens National Bank of Cincinnati v. Durr, 257 U. S. 99, 42 S. Ct. 15, which also held that where the application to a state supreme court for a rehearing presented for the first time the contention that certain of the Ohio taxation statutes were repugnant to the Fourteenth Amendment of the United States Constitution such contention came too late to raise a question for review by the Supreme Court of the United States in an application for the allowance of a writ of certiorari filed in that court.

In the case of Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, the defendant in a criminal action assailed a statute of the State of Georgia as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. The Supreme Court of the United States held that it was without jurisdiction to entertain the appeal because the federal question was not seasonably raised in the court below or passed upon by that court. We quote from that opinion as follows:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused

to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." (Citing cases)

We submit that the constitutional question should have been raised before the Kentucky Court of Appeals handed down its decision in the case. The raising of a constitutional question on a petition for a rehearing in that Court, which was not considered or passed upon by that Court, will not suffice for the reasons hereinabove stated.

CONCLUSION

The opinion of the Kentucky Court of Appeals determined the litigation between the parties on the merits of the case.

There was no United States constitutional question timely presented during the course of the proceedings below. Nor did the state court's decision turn upon any federal constitutional question and this was not necessary because the decision was rendered under applicable Kentucky common law.

The opinion of the Kentucky Court of Appeals is clear and correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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